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IN THE

Supreme Court of the United States

No. ~~869~~ 48 of 1966

HERBERT HEIDER, Administrator for the Estate of
JAMES D. HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent,
and
HERBERT HEIDER, Administrator for the Estate of
DAVID HEIDER, Deceased,
Petitioner,
vs.
MICHIGAN SUGAR CO., a Michigan Corporation,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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STATEMENT OF FACTS

On December 21, 1958 James D. Heider, a twelve year old boy, and David Heider, his eight year old brother, drowned while on the lands of the Michigan Sugar Company, in an area just north of Sebewaing, Michigan, and near the shore of the Saginaw Bay.

On October 20, 1960, two lawsuits were filed in the Circuit Court for Saginaw County claiming damages under the Michigan Death by Wrongful Act Statute, M.S.A. 27.711. These actions were brought by the same administrator, Donald Heider, the father of the children. The pleadings in each case alleged that the Michigan Sugar Company operated a sugar beet processing plant on its premises, and that in connection therewith it had maintained artificial ponds for the storage of water used in its sugar manufacturing procedures; that this water was contained in large, open, dangerous, unnatural chemical ponds and that the waste product of the sugar from the plant formed a foam-like substance on the surface of the water which had the appearance of snow or ice. It was stated that the defendant sugar company knew that the ponds froze except around the points where the waste products were dumped into the pond and that the waste products gave the appearance of frozen ice or snow. It was alleged that because it was difficult to distinguish the foamy appearance from the frozen area that a dangerous and deceptive condition was created which would be likely to entrap persons, and especially children, and would be likely to bring about their death unless adequate warning signs and fences were erected.

In the case of David Heider, the declaration also contained this statement:

> "27. That David Heider is the minor son of plaintiff, Donald Heider, and that on the 21st day of December, 1958, said son with his brother, James Donald Heider and their dog set out muskrat trapping."

In the lawsuit brought in the death of James Heider, this allegation was contained in plaintiff's declaration:

"27. That James Heider is the minor son of the plaintiff, Donald Heider, and that on the 21st day of December, 1958, said son with his brother, David and their dog set out muskrat trapping."

Defendant alleged as its defense that the children were on the premises of the defendant as trespassers and were there without the knowledge and consent of the defendant and without any invitation on the part of the defendant.

On the issue thus joined, a pretrial conference was held on May 23, 1960 before the Honorable Eugene Snow Huff, Circuit Judge, at Saginaw, Michigan. The plaintiff's claim was again asserted at this time:

"(2) The Court: Do you want to tell us now what this case is about?

"Mr. Pillon: 'The two boys were brothers, James and David. On December 21, 1958 it was about 12 degrees below zero and they were muskrat hunting, they had some traps with them and they went onto some ponds that are maintained by the defendant. The ponds are places where the defendant dumps its waste or by-products from potatoes, which has got some chemicals in it. * * *.'"

At the pretrial conference the cases were consolidated for trial; one as a jury case and one as a non-jury case. The trial of the causes began on February 9, 1961 and in his opening statement plaintiff's counsel said:

"Now what happened in this particular case, is that David Heider was eight years of age at this time. It was on December 21, 1958. He was with his brother, James, we call him Jimmy, he was eleven years old and they had been for quite a period of time setting traps out near Sebewaing and the various parts of the community.

"Now, on this particular day it was exceedingly cold. It was 12 degrees below zero or approximately thereabouts, and these two boys went out on a Sunday afternoon, about 3:00, to set their traps. They were hunting for, trapping for, I believe it was muskrat, something to sell to make a little money.

"The ponds were frozen solid, but they walked across, at the area they walked across, they walked across like the center island and when they came back, they didn't come back the same identical route they went over but, instead, they walked a different angle back.

"They had their traps with them and they were looking for places to set the traps, what was a logical place, in a boy's mind, to set a trap for catching muskrats, and as they were walking across the pond in a different direction, they lost their life, and the way it came about was that the sugar company had a pipe which drains from the other ponds from the plant, dumping water into this pond, and this water has a chemical compound in it of such a nature that on the top of the water it forms like soap, it looks like, just like I suppose a lady taking a bubble bath. It looks like a lot of soap but in the winter time now, this soap gave the appearance of freezing. The substance, whatever it is, it gets cold and it gets hard, and it covers all of the water."

In the trial, Mrs. Alma Heider, the mother, testified on direct examination:

"Q. Did you know that James, or Jim, was trapping?

A. Yes, I did.

Q. How do you know that?

A. Because I went with him.

Q. Did you always go with him?

A. Not always. I went with him when he started to trap, he wanted to trap and I said, 'Well, where do you trap?' and I said, 'I want to see where you

are going first,' so he took me down and showed me where they trapped.

(256) Q. Now do you recall the 21st of December, 1958, the time that David came over to your house?

A. Yes, he came over after dinner.

Q. He came over after dinner?

A. Yes.

Q. And did he and James start out to trap?

A. They were playing until about 3 o'clock, in the house, they were working on a model plane until about 3 o'clock, and then they or Jim asked whether he could still go out and set a few traps and I said, 'Yes, providing they were back before 5 o'clock.'

Q. And why did you want them back?

A. Because we had a church program in the evening and we had to have an early supper. My son Herbert was leaving back for Detroit and he wanted to have supper at 5 o'clock.

Q. Was Jim in that program at the church?

A. Yes, he was. He belonged to the Sunday schools, sang in the choir on Sunday morning.

Q. Now, what happened after you told him to come back at 5 o'clock?

A. Well, they didn't come back when it was 5 o'clock.

Q. So what did you do?

A. Well, I was kind of provoked because they never did, he never did that when he promised something he always kept his promises, so I got in the car and I said, 'Well, I'm going to go look for them.'

Q. Where did you drive to?

(257) A. I drove out to Bayshore where he had his traps set, I had been out there before on Thursday evening before to lift a trap and I knew just exactly where he was going.

Q. You had been out to Bayshore the Thursday before?

A. Yes, Thursday evening right after around 5 o'clock I went with him to lift his trap.

Q. Where did you go that Thursday evening?

A. Just out the Bayshore Road and stopped at the end of this dike they are all talking about, got out of the car and I didn't go back, he looked at his trap and he had a rat and he got it out and threw it in the car and I didn't even shut off the motor, got in the car and we went back home.

Q. What do you mean, he had a rat?

A. A muskrat, what he was trapping for.

Q. Now, was this, where was this place that the trap was set?

A. That was the very first, the very first one at the end of the road there, the very first dike.

Q. In relation to, I have got you up here, this number four pond, in relation to that pond, was it over the embankment of the pond?

A. Where he had his trap set?

Q. Yes, where did he have it?

A. On the other side of the bank."

During the trial, plaintiff's counsel produced several witnesses who testified that trapping was regularly done on the defendant's premises, and that this fact was well known to the defendant's agents.

These cases were concluded, and verdicts were rendered against the defendant in each of the actions. A motion for a new trial was made in each cause, and the opinion of the trial judge respecting these motions was filed May 10, 1962. This opinion is appended to plaintiff's petition as Appendix A. The trial judge says (page 21):

> "The facts in the two cases were comparatively clear and un ontroverted. On the afternoon of December 21, 1958, 12 year old James Heider and his eight year old brother, David Heider, received permission from their family to take their bicycle and their cocker spaniel to set out muskrat traps in the vicinity of their homes in Sebewaing, Michigan."

The motions for new trial were denied, and appeal was thereafter taken by the defendant to the Supreme Court of the State of Michigan. While the Brief was being prepared, defendant's counsel for the first time became aware of a Michigan statute, at 201 PA 1953; C.L. 1948, Section 300.201, M.S.A. 13.1485. This statute provides:

> "'RESTRICTIONS OF SUITS BY HUNTERS, FISHERMEN OR TRAPPERS. Act 201, 1953, p. 281; eff. Oct. 2.
>
> An Act restricting suits by persons coming upon the property of another for the purpose of hunting, fishing or trapping; and to declare the limited liability of owners of property within this state.
>
> The People of the State of Michigan enact:
>
> 13.1485 Limited liability of property owner or tenant to fishermen, hunters or trappers. Section 1. No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, a tenant or lessee. (C.L. '48, 300.201)'"

It was submitted by defendant that this statute was controlling of the issues raised on appeal inasmuch as the facts were uncontroverted that the boys were on the defendant's premises to trap muskrats. This fact which was reiterated in plaintiff's brief which opens under the heading "Counter-Statement of Facts:

> "On December 21, 1958, James Heider, age 12, and David Heider, age 8½, and their cocker spaniel drowned while trapping for muskrats and minks on the defendant's property."

The appeal was considered by the Michigan Supreme Court, and the cases were decided on January 7, 1964. The cases were decided by the Michigan Supreme Court, and the court's opinion is reported in 375 Mich. 490; 134 NW 2d 637. Justices Kelly and Dethmers voted for a reversal of the lower court decision and concluded that the evidence was insufficient to support a judgment under the existing Michigan common law, and that the judgment in each case was against the clear preponderance and contrary to the great weight of evidence. These judges then went on to consider this statute and found the statute to be applicable and ruled that the causes should be dismissed.

Justices O'Hara, Black and Smith applied the statute which was raised for the first time on appeal and concluded "With or without raising the question below, the Circuit Court was possessed of no jurisdiction to herein determine the merits of plaintiff's allegations." The three votes of these justices together with the votes of Justices Kelly and Dethmers constituted a majority of the court, and an Order of Dismissal was entered on May 10, 1965. Thereafter an application for rehearing was filed by plaintiff's counsel, and this application was denied on October 4, 1965.

ARGUMENT

Plaintiff's Statement of Questions Presented

I.

ARE THE PLAINTIFF'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW UDER THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED;

1. WHEN THE STATE SUPREME COURT REVERSES A CAUSE AND RENDERS JUDGMENT ABSOLUTE AGAINST THE PLAINTIFF, THE SUCCESSFUL PARTY IN THE TRIAL COURT, UPON A STATUTE AND QUESTION OF FACT THAT WAS NEVER BEFORE THE TRIAL COURT OR NOT PROPERLY BEFORE THE STATE SUPREME COURT AND CONCERNING WHICH THE PLAINTIFF HAD NO OCCASION OR OPPORTUNITY TO OFFER PLEADINGS OR EVIDENCE, OR HAVE A DAY IN COURT?

2. BY A STATE SUPREME COURT CONSIDERING AND RENDERING A DECISION BASED ON A STATUTE RAISED FOR THE FIRST TIME BY BRIEF ON APPEAL?

3. BY A STATE SUPREME COURT DECISION WHICH ALLOWS DEFENDANT TO CHANGE HIS LEGAL POSITION WHILE HOLDING PLAINTIFF TO HIS POSITION AS SET FORTH IN THE PLEADINGS, AND AS TRIED?

Defendant says that plaintiff's constitutional rights to due process of law have not been violated.

The verdicts and judgments of the trial court in these causes were reversed in the Michigan Supreme Court by a vote of 5 to 3. Three of the justices voting for reversal found that a statute raised for the first time on appeal was jurisdictional in nature and dismissed the actions on this basis. Two justices, who concurred in reversal, found that the plaintiffs were not entitled to recovery inasmuch as there was not sufficient testimony to support the verdicts on a common law theory of negligence. These two

concurring justices also considered the statute and, by way of dicta, found the statute to be applicable. The reason for the justices venturing an opinion regarding the statute, and when such an opinion would not have been required, is explained by Justice Black in *Keenan v. County of Midland,* 377 Mich. 57 at page 66:

> "It is high time that the profession be informed as to how and why these occasional aberrations of the Court do occur. When two or more discordant opinions for one case are proposed, a minority and sometimes a majority of our members have no idea, and can get no information, respecting the signature intention of other members of the Court. The Court by long tradition proceeds to play—on opinion day—a sort of showdown poker game. No one knows, as the separate opinions are passed around our conference table for signature, what cause or principle is due to prevail and what cause or principle is due to fail. And when the respective signatures are totted up and the signed opinions are sent in to the clerk, those opinions regularly (*Myers* is an example) leave members of the profession wondering whether they or members of the Court have become lightheaded. As for the result, it stands, inexorable as death and taxes, unless a rehearing is ordered."

It would seem that if plaintiff's rights are to be examined that it should first be considered whether a statute can be raised for the first time at the appellate level if that statute is such as to grant jurisdiction or deprive the court of jurisdiction in any cause. This precise question was considered in *In re Estate of Fraser,* 288 Mich. 293 and in that case, preceding a rather long list of authorities, is this proposition:

> "Courts are bound to take notice of limits of their authority, and a court may, or should, on its own motion, though the question is not raised by the

> pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding."

This decision is approved in *Lehman v. Lehman*, 312 Mich. 102, where it is stated,

> "The question of jurisdiction may be properly presented to and passed upon by a court at any stage of pending proceedings."

This concept was followed in *Teeter v. Teeter*, 332 Mich. 1, and as recently as *Haenlein v. Saginaw Building Trades Council, A.F.L.*, 361 Mich. 263, wherein Justice Smith writes of this problem:

> "Yet the inaction or ineptitude of counsel does not relieve a court of the duty of determining its own jurisdiction. *Jones v. Amsel*, 388 Pa. 47, 51 (130 A2d 119): 'The chancellor himself is not (because of failure of the parties to raise the issue) thereby relieved of the obligation of determining his own jurisdiction.'
>
> "The employment of an analogy may serve to bring the issue before us in sharper focus. We will assume that through some misconception of the law, a bill for divorce is filed in the probate court,* that general appearance is entered by the defendant, who challenges jurisdiction in the answer, that thereafter he writes letters to all parties that he will not participate in the trial, does not do so, and that decree *pro confesso* against him is taken. The decree of the probate court is a complete nullity. Challenge thereto will be heard by any court at any time from any party and will be raised by any court

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* Jurisdiction in divorce cases is granted to the circuit courts by statute and not to the probate courts. (M.S.A. 25.86)

> itself, *sua sponte,* should the circumstances become known to it. No rights can be built on such a decree, any officer attempting execution on the faith thereof is a mere trespasser, and the decree may be directly or collaterally assailed. In short, it is a mere *brutum fulmen,* wastepaper. See *Fox v. Martin,* 287 Mich. 147."

There would seem to be little question that a question of jurisdiction can be raised at any time. The practice in Michigan does not vary significantly from federal practice in this regard. While Michigan has no rule comparable to Rule 12h(2) of the Federal Rules of Civil Procedure, it can be fairly concluded that all courts at all times should consider whether they are operating within the scope of their constitutionally granted authority. *French v. Jeffries,* C.C.A. Ill., 1945, 149 F. 2d 555, cert. denied, 326 U.S. 755, 90 L. Ed. 453, 66 S. Ct. 93; *New York, N.H. & H.R. Co. v. Jenkins,* 350 U.S. 155, 76 S. Ct. 227, 100 L. Ed. 166.

A second question arises if it is determined that a jurisdictional statute can be raised for the first time on appeal, and that question is whether the statute is jurisdictional in nature.

The Michigan Constitution of 1908, now superseded, is applicable to these cases and provides in Article VII, Section 10 that:

> "Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this constitution and not prohibited by law * * *."

The statute in question reads:

> "RESTRICTIONS, OF SUITS BY HUNTERS, FISHERMEN OR TRAPPERS.
>
> * * * * *
>
> "No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other a valuable consideration for the purpose of fishing, hunting or trapping, with or without permission, against the owner, tenant or lessee

> of said premises unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant or lessee."

The cause of action is prohibited by law, and, accordingly, outside the jurisdiction of the circuit courts.

The final question to be considered is whether the statute is applicable in these cases. Plaintiff's counsel on page 10 of the Petition states that the Supreme Court's opinion:

> "permitted the defendant to raise at the eleventh hour a statute, post-trial, and bind the plaintiff to facts established while not giving the plaintiff his day in court to establish the facts in relation to the statute."

He says also,

> "* * * No opportunity was afforded the plaintiff to amend his pleadings in relation to the statute or in relation to the facts" and "If the defendant had properly and initially pleaded the statute, now belatedly raised, the plaintiff, by Michigan Court Rule and procedure would have had an opportunity to amend his declaration and to produce facts to show that David Heider was not, in fact, hunting, fishing or trapping, and that even if James Heider was trapping on the defendant's land (which the record nor pleadings does not affirmatively disclose) the statute was (1) unconstitutional as applying to them. * * *"

The efforts of plaintiff's counsel to escape the force of the statute by arguing that he was not afforded an opportunity to prove the status of the youngsters as being other than trappers on defendant's premises comes with poor grace. There is no doubt about the purpose for which the boys were on the premises.

Due process ought not to be construed to permit the plaintiff to deny his own position on fact questions. The plaintiff's version of the facts of this case, as expressed in his pleadings, was that the boys were trapping muskrats, and these facts were similarly stated at pretrial:

> "* * * They were muskrat hunting. They had some traps with them, and they went onto some ponds that are maintained by defendant."

Mr. Pillon's opening statement to the jury at the time of trial is the same regarding the activity of the children on the defendant's land. In addition, the mother testified on the direct examination conducted by Mr. Pillon that the boys left on that bitter cold Sunday in December to go muskrat hunting.

It was never the contention of defendant that the children were muskrat trapping on its premises. This fact was first plead into the lawsuit by plaintiff's counsel, and it persisted and continued throughout the trial of the cause and into the appeal stages, even to the opening of the appellee's brief which reads:

> "On December 21, 1958, James Heider, age 12, and David Heider, age 8½, and their cocker spaniel drowned while trapping for muskrats and minks on defendant's property."

These facts contained in the pleadings, which were uncontroverted, are to be treated as true, and are admissions which have a binding effect upon the party making them. The Michigan Court Rules, in effect at the time the declarations were filed, so state.

Michigan General Rules of pleadings, Rule 17, Section 10, "Any statement of facts set forth in any pleading shall be treated as an admission by the pleader and need not be proved by the opposite party."

Court rule number 23, section 6, which was the court rule in effect prior to rule 17 as quoted above, and which contained the exact language, was interpreted in *Grand Trunk Western Railroad Company v. Lovejoy,* 304 Mich. 35. The court stated:

> "In this jurisdiction under court rules all statements contained in a litigant's pleading insofar as they are admissions against interest rather than self serving are treated as evidence thereof. In such admitted facts or circumstances need not be proven by an opposing litigant."

Court rule 17 was construed in *Cashaw v. Greyhound Lines, Inc.,* 331 Mich. 291, and the court in that case concluded that the plaintiffs are bound by their declarations as set forth in their pleadings.

It is not a denial of due process to bind a party to the facts pleaded by such party even if it should transpire that such facts are sufficient to oust the courts of jurisdiction to hear the lawsuit, and to deny the plaintiff the remedy sought.

Plaintiff's Further Statement of Question Presented

II.

ARE THE PLAINTIFF'S CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF LAW UNDER THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED;

1. BY A MICHIGAN STATUTE RELATING TO THE TRESPASSING INDIVIDUALS WHO HUNT, FISH OR TRAP WHERE THE PLAINTIFFS-DECEDENTS, THOUGH MINORS, ARE CLASSIFIED WITHIN SAID STATUTE AND WHERE SUCH STATUTE IS CONTRARY TO THE COMMON LAW RIGHTS OF ALL MINORS WHO HAVE A CAUSE OF ACTION EVEN THOUGH THEY MAY BE TRESPASSERS?

2. BY A MICHIGAN STATUTE WHICH IMPOSES LIABILITY FOR ORDINARY NEGLIGENCE ONLY IF THE MINORS, AGE EIGHT AND TWELVE, RESPECTIVELY, PAY A VALUABLE CONSIDERATION?

It is asserted by plaintiff's counsel that the trapping statute is unconstitutional as applied to David Heider and James Heider, because it is an unreasonable and arbitrary classification and discrimination against children of that age, and that, accordingly, they are denied equal protection of the law as secured by the 14th Amendment of the Constitution of the United States.

In *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 84 L. Ed. 590, 60 S. Ct. 406, Mr. Justice Reed said:

> "Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

The purpose of the trapping statute should be plain. It seeks to relieve land owners of an evil prevalent in the State of Michigan. Private property is commonly disregarded by "fishermen, hunters and trappers," persons who, in the present mobile state of our entire population, create a problem of substantial proportions to those who own or control areas upon which there are, or people think there are, recreational facilities.

Some consideration must be given the question whether the word "person" includes in its definition an 8 year old child and a 12 year old child. The word "person" in its natural and unrestricted sense refers to individual of either sex, men as well as women, and the term is defined as meaning a man, woman or child. 40 C.J.S. 688, *LaBlue v. Specker,* 358 Mich. 558. If minors are to be held exempt from the provisions of this statute, then the legislation would be robbed of a substantial part of its meaning, and there would be only partial relief granted to the owners of properties whose rights prompted the enactment of the statute.

It is contended by counsel for the plaintiff that the statute was not meant to include children within its definition. A similar statute was construed in *Barcoloni v. Atlantic City and Railroad Company,* 81 Atl. 494. In that case a twenty-one month old child was denied recovery under the provisions of a similar statute. It is there said:

> "This statute is a bar to recovery by any person who walks, stands or plays upon any railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned and applies to all persons alike, without distinction as to their age, physical or mental condition."

The *Barcoloni* decision was decided by an intermediate appellate court in New Jersey, and that court's decision was given full weight in *Erie Railroad Company v. Hilt*, 247 U.S. 97, 62 L. Ed. 1003, 338 S. Ct. 435. The Supreme Court, speaking through Justice Holmes, held that even though the court that decided *Barcoloni* was not the highest court in New Jersey, its decision should be afforded great weight unless the Court was convinced that it was wrong in its interpretation. Justice Holmes indicated that he felt the New Jersey Appeals Court in *Barcoloni* had correctly applied the statute and that the term person did include a child even of tender years and that recovery should be denied the plaintiff. The *Hilt* case involved a boy of less than seven years of age who was playing marbles near the railroad company's siding.

Similar conclusions have been reached in *Egan v. Erie Railroad Company* (N.J. 1959) 148 A. 2d 830, and in *Kowaleski v. Pennsylvania Railroad Company*, 103 F. 2d 827, (3rd Cir. 1939), certiorari denied, 308 U.S. 556, 60 S. Ct. 95, 84 L. Ed. 467, where recovery was denied; a twelve year old boy was struck by an engine while walking on the railroad right of way.

This precise question reached the Supreme Court again in 1932 in the decision *Erie Railroad Company v. Duplak*, 286 U.S. 440, 76 L. Ed. 1214, 52 S. Ct. 610. A statute which barred recovery by "any person who walked, stood or played upon a railroad" was applied to all persons alike without distinction as to age or physical or mental condition.

The Supreme Court of Michigan has considered the constitutionality of class legislation, and the view regarding such legislation is expressed in *Burgess v. City of Detroit*, 359 Mich. 269 at page 280:

> "This Court has many times held that legislation is not unconstitutional because it is legislation of a particular kind or character, or because it benefits a particular class, so long as the law operates equally upon those within the particular class. *In re Phillips*,, 305 Mich. 636; *Lake Shore Coach Lines, Inc., v. Secretary of State*, 327 Mich. 146; *People's Appliance, Inc. v. City of Flint*, 358 Mich. 34. • • • The legislative body in its wisdom determines who shall receive benefits. In this instance it chose to exclude plaintiffs. This Court cannot and will not question its reasons unless they appear to be palpably arbitrary or unreasonable. *Ver Hoven Woodward Chevrolet, Inc., v. Dunkirk*, 351 Mich. 190; *Metropolitan Funeral System Association v. Commissioner of Insurance*, 331 Mich. 185."

In *Tribbet v. Village of Marcellus*, 294 Mich. 607, the following statement is contained which was quoted with approval in *In re Phillips, supra:*

> "Courts, however, cannot review legislative discretion and declare a given classification arbitrary simply because they differ with the legislature as to the propriety of the classification and the sufficiency of the reasons upon which it is based; for the law making power is vested in the legislature. It must not be lightly assumed that legislators are less wise or less mindful of the mandates of the Constitution, than judges are. Therefore, it is only in cases where it is manifest upon the face of the statute that a classification therein is based upon no reason, but is purely an arbitrary act, that courts may and must, for that reason declare unconstitutional."

The statute under consideration in the *Phillips* case applied alike to all minors whether they were citizens, subjects to the friendly or enemy governments, and equally to all the aliens who desired to be appointed guardians.

The form was approved. The statute in this case applies to all persons. Certainly there can be no broader class than this, and certainly a statute cannot be more equally applied than one which is applicable to all persons. There is a legally recognizable interest which the state may, and should protect. That is the right of property owners to be free from invasion by hunters, trappers and fishermen. It is submitted that the legislation in question is proper and is applicable to the facts of this case.

Wherefore, Defendant prays that the Petition for Certiorari be denied.

Respectfully submitted,

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